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In The

Supreme Court of the United States

October Term, 1997

WILLIAM P. TODD and DIANA J. TODD, on their own behalf and as next friends for their son, WILLIAM MATTHEW TODD, *et al.*,

Petitioners,

v.

RUSH COUNTY SCHOOLS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the Rush County Schools Extracurricular Activities Drug Testing Program, which authorizes random urinalysis drug testing of all students who participate in extracurricular activities, violate the Fourth and Fourteenth Amendments to the United States Constitution?

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STATEMENT OF THE CASE

The respondents respectfully refer the Court to the opinions of the Court of Appeals and the District Court below for a concise statement of the facts material to the consideration of the question presented in this petition. Appendix to Petition for Writ of Certiorari at pp. A-1 through A-3 and A-15 through A-21.

ARGUMENT

Reason For Denying The Writ

Plenary review in this case is inappropriate because the Court of Appeals correctly affirmed the District Court's decision in this case consistent with the rationale of *Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995), this Court's only controlling precedent.

A. Introduction

In *Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995), this Court held that a public school district policy authorizing random urinalysis drug testing of students participating in student athletics did not violate the Fourth and Fourteenth Amendments to the United States Constitution:

> The most significant element in this case is the first we discussed: that the [drug testing policy] was undertaken in furtherance of the government's responsibilities under a public school system, as guardian and tutor of children entrusted to its care. . . . [W]hen the government acts as guardian and tutor, the relevant question

> is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 665 (footnote omitted). At issue in this case is a public school drug testing policy which is essentially identical to the one at issue in *Vernonia* with one difference: the drug testing policy at issue in this case applies to all extracurricular activities, including student athletics.

In ruling that the Rush County Schools Extracurricular Activities Drug Testing Program did not violate the Fourth Amendment, the Court of Appeals and the District Court below addressed two issues: (1) whether the program was reasonable under the special needs exception to the Fourth Amendment; and (2) whether this Court's ruling in *Vernonia* may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities. These two issues are analyzed below.

B. Employing The Context-Specific Inquiry Mandated By This Court In *Vernonia* And *Chandler*, Both The Court Of Appeals And The District Court Correctly Found That The Rush County Schools Extracurricular Activities Drug Testing Program Was Reasonable Under The Special Needs Exception To The Fourth Amendment.

In *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997), this Court held:

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on "special needs,

> beyond the normal need for law enforcement." . . . When such "special needs" – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a *context-specific inquiry*, examining closely the competing private and public interests advanced by the parties.

Id. at 1301 (emphasis added), *citing Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). *Vernonia* is this Court's only controlling precedent in which the "special needs" exception to the Fourth Amendment was applied in the "public school" context.

In *Vernonia*, this Court held that a school district policy authorizing random urinalysis drug testing of students participating in student athletics did not violate the Fourth and Fourteenth Amendments to the United States Constitution. *Vernonia*, 515 U.S. at 665. Specifically, *Vernonia* stands for the proposition that the random urinalysis drug testing program at issue did not violate the students' rights under the Fourth Amendment to be free from unreasonable searches because the policy was reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students in general (and student athletes in particular); (2) the relative unobtrusiveness of the search; and (3) the severity of the need met by the search. *Vernonia*, 515 U.S. at 648-666. *See also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (random drug testing of employees engaged in safety-sensitive occupations such as operation of train held constitutional under Fourth

Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of employees with access to classified or sensitive information held constitutional under Fourth Amendment).

In finding the special needs exception to the Fourth Amendment met in *Vernonia*, this Court employed a context-specific inquiry:

> Central in our view to the present case is the fact that the subjects of [this drug testing program] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.
>
> . . . .
>
> Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude [the drug testing program] is reasonable and hence constitutional.
>
> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts [*i.e.*, contexts other than the public school system].

Vernonia, 515 U.S. at 654, 664-65. The question presented in this case is whether a random drug testing program applicable to all extracurricular activities, including student athletics, "passes constitutional muster."

The first issue addressed by the Court of Appeals and District Court below was whether the Rush County Schools Extracurricular Activities Drug Testing Program was reasonable under the special needs exception to the Fourth Amendment. The petitioners argue that there is no

evidence of a drug crisis in this case similar to the one in *Vernonia*, A-25, and that the special needs exception to the Fourth Amendment is therefore not satisfied. *Id.* In finding that the program was reasonable under the special needs exception to the Fourth Amendment, the District Court below analyzed this issue as follows:

> If this were a case like *Chandler* where the State of Georgia was attempting to create out of whole cloth a "special need" for the testing of adult political candidates, [the empirical evidence of drug use by the students in this case] may not be sufficient to show that need. . . . However, the controlling precedent is *Vernonia*, and that case indicates that the evidentiary hurdle for a public school is lower than in other contexts. The [*Vernonia*] Court states generally that, "We have found such 'special needs' to exist in the public-school context." . . . [T]he evidence presented, while perhaps not rising to raging epidemic levels, can support a finding that there was a "special need" for the Program in Rush County. There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the "important enough" interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youths may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

A-26 through A-27. The Court of Appeals concurred. A-3 through A-6.

The petitioners in this case argue, in effect, that the special needs exception to the Fourth Amendment cannot

be met unless the record supports a finding of a drug crisis of "raging epidemic levels." However, this Court's precedents do not support this argument. Proof that a drug problem exists among the individuals or groups tested is not even a constitutional prerequisite under this Court's precedents. *See, e.g., Skinner*, 489 U.S. at 601 (random drug testing program found constitutional based on findings of drug use by railroad employees nationwide without proof that a problem existed on the particular railroads whose employees were subject to the test); *Von Raab*, 489 U.S. at 656 (random drug testing program found constitutional where there was no documented history of drug use by any custom officials). *See also Chandler*, 117 S. Ct. at 1303.

Although proof that a drug problem exists among the individuals or groups tested is not a constitutional prerequisite, the record in this case *does* support a finding of "a demonstrated problem of drug abuse" among the students attending Rush County Schools. *Chandler*, 117 S. Ct. at 1303; A-15 through A-21.[1] Unlike *Chandler*, the record in this case *does* reveal evidence of drug use, and unlike *Chandler*, the need revealed is "special" not "symbolic." *Chandler*, 117 S. Ct. at 1305 ("[t]he need revealed, in short, is symbolic not 'special,' as that term draws meaning from our case law").

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[1] The empirical evidence of Rush County Schools' effort to curb the drug use by its students is collected and separately bound as Exhibits 2 and 3 to the deposition of Assistant Superintendent Bet. J. Kotowski. Deposition of Bet. J. Kotowski, November 20, 1996, R. Doc. 29, Exhibit 2, Vol. I, Part 1; R. Doc. 30, Exhibit 2, Vol. I, Part 2; R. Doc. 31, Exhibit 3, Vol. II, Part 1; R. Doc. 32, Exhibit 3, Vol. II, Part 2.

In short, the record in this case demonstrates that Rush County Schools had a "legitimate concern" about drug use among its student body. A-27. In an effort to curb drug use by students and acting as "a reasonable guardian and tutor" would act under similar circumstances, *Vernonia*, 515 U.S. at 665, Rush County Schools implemented a drug testing policy consistent with the reasoning of this Court in *Vernonia*. *Vernonia* does not require a public school district to wait until there is a drug problem of "raging epidemic proportions" before acting. *Id.*

C. Both The Court Of Appeals And The District Court Correctly Found *Vernonia's* Reasoning May Be Constitutionally Extended To Cover A Drug Testing Program Which Applies To All Students Participating In Extracurricular Activities Such As The Rush County Schools Extracurricular Activities Drug Testing Program.

The second issue addressed by the Court of Appeals and the District Court below was whether *Vernonia's* reasoning may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities. The petitioners in this case "argue that the difference in the [drug testing programs in *Vernonia* and in this case] – student athletes versus all extracurricular participants – renders the Rush County Schools Extracurricular Activities Drug Testing Program] unconstitutional, at least as it applies to the non-athlete extracurricular participants." A-25.

In finding that *Vernonia's* reasoning may be constitutionally extended to cover a drug testing program which

applies to all students participating in extracurricular activities, the District Court analyzed this issue as follows:

> In the end, however, any perceived differences between the student athletes in *Vernonia* and the non-athlete extracurricular participants in this case turn out to be more ethereal than real. As the Court in *Vernonia* stated, *all* public school students have a diminished expectation of privacy; the Court simply pointed out that athletes had even lower expectations. Furthermore, the possibility of injuries is not simply isolated to athletic activity. While the possibility of injury is exacerbated in athletic activities, it is not isolated only to those situations; . . . [W]hile perhaps not rising to the level of being regulated by the Indiana High School Athletic Association, extracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations. Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant. Also, much like athletes, students in other extracurricular activities can take leadership roles in the school community and can serve as an example to others. Being elected class president may put a student in a venerated position, much like that of a star athlete. In fact, the same could be said of any student who participates and excels in any extracurricular activities. Thus, the school has an interest in the conduct of those who may serve as an example to others. In the final analysis, the reasoning of *Vernonia* seems to hold true for any student who is a member of an extracurricular activity. The

> [*Vernonia*] Court simply pointed out these reasons were especially applicable to student athletes.

A-27 through A-28.[2] The Court of Appeals concurred. A-3 through A-6.

In short, a close reading of *Vernonia* reveals that its reasoning may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities such as the program at issue here.

D. The *Trinidad* Case Discussed In Petitioners' Supplemental Brief Is Inapposite To This Case Because Its Holding Is Limited To Students Participating In Marching Band And Its Rationale Is Tailored To Its Unique Facts.

Although the lower court in *Trinidad School District No. 1 v. Lopez*, 1998 WL 373305 (Colo. June 29, 1998), held that random urinalysis drug testing of students who participated in any extracurricular activities was not violative of the Fourth Amendment, Defendants' Brief in Support of Motion of Summary Judgment, Rec. Doc. 23, Exhibit C, the majority opinion of the Supreme Court of

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[2] Indeed, some legal commentators have argued that the rationale of *Vernonia* can be logically extended to apply to a school drug testing program which covers *all* public school students. *See, e.g.*, Note, *Who Will Speak for the Teachers? Precedent Prevails in Vernonia School District 47J v. Acton*, 33 Houston L. Rev. 1229 (1996); Note, *The 4Rs of Drug Testing in Public School: Random Is Reasonable and Rights Are Reduced*, 80 Minn. L. Rev. 1222 (1996). Defendants' Brief in Support of Motion for Summary Judgment, R. Doc. 23, Exhibits A and B.

Colorado in *Trinidad*, in reversing the lower court, took "great care to attempt to limit its holding . . . 'to the marching band.' " Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, Supp. App. at p. 32. In addition, the rationale of the majority opinion in *Trinidad* was uniquely tailored to the facts of that case. *Id. passim*. Accordingly, respondents respectfully submit that *Trinidad* is inapposite to this case.

Justice Scott's dissent in *Trinidad*, joined in by Chief Justice Vollack, cogently refutes not only the majority opinion's erroneous reasoning but also demonstrates why *Trinidad* is inapposite to this case:

> Based upon the record in this case, then, I would hold that the Policy adopted by the Trinidad School District is consistent with our state and federal constitutions. I am not persuaded by the majority that a constitutionally significant distinction exists between voluntary participation in an activity that is not required, here marching band, but includes attending an elective for-credit music class so as to result in an "absence of voluntariness." . . . Nor do I believe that the "qualitatively different type of [communal] undress" combined with the Band rules and regulations is constitutionally "significant,". . . . at least not to cause a result contrary to *Vernonia*.
>
> . . . .
>
> Finally, while I concede that the questions before us are not easy to resolve, I can see no distinction of legal significance to be drawn because a student engaged in Band as a extracurricular or co-curricular activity also is awarded academic credit for their participation.

> The portion of the policy under review impacts 73 students, or less than 15% of the student body, who voluntarily participate; it does not impose routine drug testing on all students required to attend school.

Supp. App. at pp. 28-29.

Given the limited holding of the majority in *Trinidad* and *Trinidad's* uniquely tailored rationale, respondents respectfully submit that the *Trinidad* case does not "directly conflict with the decision of the Seventh Circuit Court of Appeals in this case." Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari at p. 4. Therefore, the *Trinidad* case does not provide this Court with a "compelling reason" for granting petitioners' writ of certiorari in this case. *See* Supreme Court Rule 10.

CONCLUSION

Rush County Schools has a drug problem among its students. Is the drug problem "severe"? As far as Rush County is concerned, the answer to that question is an unequivocal yes. Rush County Schools acted as a "reasonable guardian and tutor" would act under similar circumstances. The drug testing program implemented by Rush County only applies to students who voluntarily participate in extracurricular activities, including student athletics. Therefore, respondents respectfully submit that the rationale of *Vernonia* may be constitutionally extended to cover the Rush County Schools Extracurricular Activities Drug Testing Program.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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